Equitable Estoppel
Res Judicata
Record on Appeal
FRBP 8006
FRBP 8009
BAP Rule 4(c)
Judgment
Interest
Appeal(argument raised first time on)

Smith v. Hirte et. al
In Re Smith

BAP # OR-98-1370-BKRy
Bankruptcy # 697-62183-aer13

9/13/99 BAP (affirming Radcliffe in part, vacating in part)
(No written underlying bankruptcy court opinion)

Unpublished

Debtor appealed from an order allowing a judgment creditor's claim. She argued the creditor was estopped from making the claim because in the creditor's own prior Chapter 7 he had scheduled the claim as "uncollectible." Debtor further argued there was fraud in the state court proceeding (where the judgment was obtained), which she discovered after the proceedings, thereby giving rise to an attack in bankruptcy court. Based on principles of res judicata, the bankruptcy refused to consider this argument. Finally, she argued for the first time on appeal that the bankruptcy court neglected to account, in its interest calculation, for a payment made against the judgment.

Held: Affirmed in part; vacated and remanded in part.

Re: Estoppel: The BAP held Debtor could not claim estoppel because she did not plead or prove "detrimental reliance."

Re: Fraud: Although Debtor's fraud argument might have applicability, the BAP did not consider it because Debtor provided an inadequate record on appeal.

Re: Interest: The BAP held Debtor's "interest" argument would be considered for the first time on appeal to prevent a miscarriage of justice or to preserve the integrity of the judicial process; because it appeared the bankruptcy court neglected to consider the effect of debtor's payment in its interest calculation, the BAP vacated the bankruptcy court's calculation of the claim amount, and remanded for: 1) a determination of when Debtor made the payment; and, 2)recalculation of the interest.

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

FOR THE NINTH CIRCUIT

In re:	BAP No. OR-98-1370-BKRy
GERALDINE KAY SMITH,	
Debtor.	Bk. No. 697-62183-aer13
GERALDINE KAY SMITH,	
Appellant,	
v.	**M E M O R A N D U M**[1]
ED HIRTE; and FRED G. LONG, Chapter 13 Trustee,	
Appellees.	

Argued and Submitted by Telephone Conference Hearing on May 20, 1999

Filed - September 13, 1999

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Albert E. Radcliffe, Bankruptcy Judge, Presiding

Before: BRANDT, KLEIN, and RYAN, Bankruptcy Judges

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 13 and 9th Circuit Rule 36-3.

E99-20(9)

The debtor objected to a claim based on a judgment debt. The court found her estoppel argument irrelevant, precluded the rest of her arguments as res judicata, yet, finding no dispute that she had paid a portion of the debt, adjusted it accordingly. The debtor assigns error to the court's refusal to apply estoppel and its application of res judicata, and to the adequacy of the adjustment made to the claim amount. We AFFIRM, but vacate in part and remand for recalculation of interest on the claim.

I. FACTS

Over ten years ago, appellant Geraldine Smith and appellee Edwin Hirte had a falling-out over work he had performed on real property of hers, located in Ophir, Oregon. In September of 1987, he and his company, E.K. Construction Co., obtained a judgment against her for $4,127.28 in District Court for Oregon's Curry County. The award included obligations to material suppliers, some of which Ms. Smith paid. Her attempted appeal was ineffective.

In March of 1989, in California, Mr. Hirte filed petitions in bankruptcy for protection under chapter 7 of the Bankruptcy Code,[2] listing a claim against her, based on the Oregon judgment, as uncollectible and of no value.

Ms. Smith filed her chapter 13 petition in 1997 and Hirte filed an "unsecured priority" proof of claim, based on the judgment plus accrued

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[2] Absent contrary indication, all section and chapter references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure. "FRCP" references are to the Federal Rules of Civil Procedure. "BAP Rule" references are to the rules of the United States Bankruptcy Appellate Panel of the Ninth Circuit.

interest, in the amount of $9,928.00. She objected, listing sundry grounds, emphasizing alleged misrepresentations by him. The objection came on for hearing on 30 October 1997; he amended the claim the same day, reclassifying it as "secured," but leaving the amount intact. To the amended claim, she made similar objections, adding "set-off."

The transcripts contained in the record Ms. Smith has provided are edited, in places mid-sentence, and much of the colloquy, as well as some of the court's ruling and its attendant rationale, are missing. However, a theme emerges: the principles of res judicata precluded the bankruptcy court from revisiting the validity of Mr. Hirte's claim. At the 29 January hearing, the date to which the 30 October hearing was continued, for example, the court explained:

> I indicated at the last hearing there was [sic] some grounds urged as an objection to the claim by Ms. Smith. One of those grounds was that there was fraud discovered after the judgment was entered. I indicated at that point in time that you can't use the federal bankruptcy court as a means to set aside a judgment entered in the state court, at least not as a collateral attack.

Likewise, although she alleged defects in workmanship, discovered post-judgment, the bankruptcy court found that "[d]efects in construction, and matters to that effect," were precluded by res judicata.

Regrettably, the record includes only the first page, a teasing glimpse, of the combined order and judgment from the Oregon state court. On that page, the court started to list its findings:

> 1. A contract for remodeling existed between the parties.
> 2. The extent of remodeling had not been agreed upon.
> 3. The services and materials listed in Plaintiff's complaint were performed or supplied at Defendant's residence.

4. An express warranty in the oral contract did not exist.
5. There were no specifications for the remodeling.
6. The oral contract required Defendant to pay suppliers . . . .

Thus abruptly ends the only evidence in the record of the state court's findings and conclusions.

As the trial continued, the court reiterated its prior ruling and offered further findings and conclusions. Ms. Smith had not disputed the method by which Mr. Hirte had calculated interest accrual, so the dollar amount of the judgment was fixed at the amount Mr. Hirte had asserted. However, the court found she had paid a portion of the obligation and reduced the judgment debt to $8,418.50, allowing the claim as secured, with interest accruing from 30 October 1997. This appeal followed. Mr. Hirte neither briefed nor argued, nor did the Chapter 13 trustee.

II. ISSUES

A. Whether Mr. Hirte's treatment of Ms. Smith's obligation in his prior bankruptcy now estops him from asserting the claim;

B. Whether the bankruptcy court erred in overruling her objections to his claim; and

C. Whether, in conjunction with crediting payment on the judgment, the bankruptcy court should have recalculated the interest.

III. STANDARDS OF REVIEW

We review factual findings for clear error and legal conclusions by the de novo standard. Beaupied v. Chang (In re Chang), 163 F.3d 1138, 1140 (9th Cir. 1998).

We review for abuse of discretion the bankruptcy court's rejection of Ms. Smith's equitable estoppel argument. Hoefler v. Babbit, 139 F.3d 726, 727 (9th Cir. 1998). A trial court has abused its discretion if it based its order on an erroneous view of the law, Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990), or when "the record contains no evidence on which [the court] could rationally have based its decision." Alaska Limestone Corp. v. Hodel, 799 F.2d 1409, 1411 (9th Cir. 1986).

The availability of res judicata is reviewed de novo. First National Bank v. Russell (In re Russell), 76 F.3d 242, 244 (9th Cir. 1995). If res judicata is available, we review the preclusive effect the trial court gave to the prior judgment for abuse of discretion. See Miller v. County of Santa Cruz, 39 F.3d 1030, 1032 (9th Cir. 1994).

We review awards of monetary amounts set by the trial court for abuse of discretion. See Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1310 (9th Cir. 1990).

IV. DISCUSSION

Ms. Smith argues that Mr. Hirte's treatment of her debt in his prior bankruptcy estops him from now asserting his claim against her. She assigns error to the court's preclusion of her arguments due to res judicata, and therefore, as well, to the court's concomitant allowance of his claim. Finally, because she asserts she paid approximately $1,500 of the original balance near the time of the judgment, she assigns error to the bankruptcy court's failure to recalculate accrued interest against a reduced balance, and urges us, if we must affirm, to direct a correction of the amount.

A. Estoppel

Although Mr. Hirte now seeks to collect a debt he earlier called uncollectible, Ms. Smith did not plead that she relied upon Mr. Hirte's treatment of her debt in his prior bankruptcy. Failure to plead detrimental reliance generally precludes an argument of estoppel. See Lehman v. United States, 154 F.3d 1010, 1016-17 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S.Ct. 1336 (1999) (deciding issue of equitable estoppel); DeVoll v. Burdick Painting, Inc., 35 F.3d 408, 412 n.4 (9th Cir. 1994)(explaining the similarity between the elements of equitable and promissory estoppel, both of which require detrimental reliance).

While the doctrine of quasi estoppel "forbids a party from accepting the benefits of a transaction or statute and then subsequently taking an inconsistent position to avoid the corresponding obligations or effects," and may not require detrimental reliance, Davidson v. Davidson (In re Davidson), 947 F.2d 1294, 1297 (5th Cir. 1991)(dicta), no federal court has applied the doctrine in the absence of detrimental reliance. We decline to do so here.

Even if scheduling a debt is a "transaction" for estoppel purposes, which is not entirely clear, Ms. Smith has failed to plead or prove detrimental reliance, nor can we discern any in broadly reading her pleadings. She has shown no basis for estoppel.

B. Res Judicata

Ms. Smith argues that Mr. Hirte misrepresented facts to the Oregon court, that she discovered so after the fact, and that this creates an exception to res judicata in claims allowance. While this argument might have merit, see Pepper v. Litton, 308 U.S. 295 (1939); Dionne v.

Keating (In re XYZ Options, Inc.), 154 F.3d 1262 1269-70 (11th Cir. 1998)(compiling, analyzing, and affirming the vitality of the Pepper v. Litton progeny); and Hon. Barry Russell, Bankruptcy Evidence Manual § 12 (1998 ed.), Ms. Smith has provided an insufficient record to support it.

"Although we construe pleadings liberally in their favor, pro se litigants are bound by the rules of procedure." Ghazali v. Moran, 46 F.3d 52, 54 (9th Cir. 1995). The Rules and our rules (BAP Rule(s)) establish the procedures for submitting the record on appeal to the Panel. Rule 8006 puts the burden upon Ms. Smith to provide an adequate record, See Bank of Honolulu v. Anderson (In re Anderson), 69 B.R. 105, 109 (9th Cir. BAP 1986), and Rule 8009 requires a transcript to the extent the bankruptcy appellate panel rule so requires. See Kritt v. Kritt (In re Kritt), 190 B.R. 382, 386 (9th Cir. BAP 1995). BAP Rule 4(c) provides:

> Pursuant to Bankruptcy Rule 8009(b)(9), the excerpts of record shall include the transcripts necessary for adequate review in light of the standard of review to be applied to the issues before the panel. The panel is required to consider only those portions of the transcript included in the excerpts of record.

It is possible that, in light of Pepper v. Litton, the bankruptcy judge misapplied the law of res judicata, but we cannot, on the inadequate record Ms. Smith has provided, say he clearly erred in not finding a fraud on the Oregon court. See Everett v. Perez (In re Perez), 30 F.3d 1209, 1218 (9th Cir. 1994) (reiterating the rule that an appellant's failure to provide an adequate record gives grounds to affirm).

C. Interest

Ms. Smith did not raise in the trial court her argument that the interest on Mr. Hirte's claim should be recalculated because of her payment against the debt. While we generally do not consider arguments raised for the first time on appeal, circumstances may permit exceptions to this general rule.

Initially, we must determine whether hearing the new argument would prejudice the adverse party. See Parker v. Community First Bank (In re Bakersfield Westar Ambulance, Inc.), 123 F.3d 1243, 1248 (9th Cir. 1997) Bolker v. Comm'r of Internal Revenue, 760 F.2d 1039, 1042 (9th Cir. 1985). Here, where Mr. Hirte has neglected to respond to Ms. Smith's opening brief and thereby waived oral argument, what prejudice he might suffer he has invited, and does not bar review.

Next, we must find one of the three exceptions to the general prohibition. These are: whether review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process; whether the new issue arises while appeal is pending because of a change in the law; and whether the issue is purely one of law and independent of the factual record, or the record is sufficient. See Bolker, 760 F.2d at 1042. The first is here applicable.

Ms. Smith argues that, because she paid down her obligation to Mr. Hirte around the time of the judgment, the interest should have accrued only on the remaining balance. This accords with the general common law rule that partial payment stops accrual of interest on the portion paid. See Bogosian v. Woloohojian, 158 F.3d 1, 9 (1st Cir. 1998); Hadfield v. Oakland County Drain Comm'r, 554 N.W.2d 43, 46 (Mich. 1996). Despite Ms. Smith's failure to argue the point at the time, it is not clear why

the trial court did not adjust the interest amount, especially after determining that she indeed had paid.

The record does not reveal whether, but only suggests that the court did not, inquire into when Ms. Smith made her payment against the balance, obviously necessary for recalculation of interest. Perhaps Ms. Smith, by failing to argue for a recalculation of interest, gave the court no real reason to determine the date of payment. However, having found that she had made payment(s) against the balance, the court ought then to have determined when, and redetermined the interest on the adjusted balance(s). The failure to do so was at least a technical abuse of discretion: the implicit application of an incorrect rule of law. We will vacate that portion of the order and remand for the court first to determine the dates of her payment, and then to recalculate the interest.

V. CONCLUSION

Ms. Smith has not shown an abuse of discretion in the denial of estoppel to Mr. Hirte's claim, and we AFFIRM that aspect of the bankruptcy court's ruling. Although her argument as to the invalidity of his judgment raises pithy legal questions, her failure to supply an adequate record leaves us with no option but to AFFIRM.

We VACATE the bankruptcy court's calculation of the claim amount, and REMAND for a determination of when she paid the judgment down, and recalculation of the interest.

U.S Bankruptcy Appellate Panel
of the Ninth Circuit Court of Appeals
125 South Grand Avenue
Pasadena, California 91105
(626) 583-7906

NOTICE OF ENTRY OF JUDGMENT

BAP No. OR-98-1370=BKRy

RE: GERALDINE KAY SMITH

A separate Judgment was entered in this case on 9/13/99.

BILL OF COSTS:

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken. Also see, Federal Rule of Appellate Procedure 39.

ISSUANCE OF THE MANDATE:

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. See Federal Rule of Appellate Procedure 41.

APPEAL TO COURT OF APPEALS:

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the $105 filing fee and a copy of the order or decision on appeal. Checks may be made payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.

CERTIFICATE OF MAILING

The undersigned, deputy clerk of the U.S. Bankruptcy Appellate Panel of the Ninth Circuit, hereby certifies that a copy of the document on which this stamp appears was mailed this date to all parties in interest as designated by the Appellant in the Notice of Appeal.

Edwin M. Clay 9-13-89

Deputy Clerk/ Date: